No. 11760

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as FRANCIS M. STEINBACH, and CAROLYN S. STEINBACH,

Appellees.

APPELLEES' BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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SUBJECT INDEX

SUBJECT INDEX (Cont.)

TABLE OF CASES

TABLE OF CASES (Cont.)

LIST OF STATUTES AND TEXTS CITED

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JURISDICTION

Plaintiffs-Appellees are residents and inhabitants of the State of Oregon. Appellant-Defendant is a New Jersey corporation. The action involves a claim on a marine insurance policy amounting to $11,437.50, with interest. See Supplemental Complaint (Transcript p. 5). Judgment in that amount plus $1500.00 as attorneys' fees and costs was rendered on June 23, 1947, by Claude McColloch, District Judge (Transcript p. 53). The District Court had jurisdiction under U.S.C.A. Title 28, Sec.

41 (1). The Circuit Court of Appeals has jurisdiction under U.S.C.A. Title 28, Sec. 225.

FIRST SPECIFICATION OF ERROR

Under this specification of error the Appellant (page 7, Appellant's Brief) states that the District Court erred in holding that the Appellees were the proper parties to sue on the insurance policy, and permitting them to recover because:

1. They were never the owners of the dredge.
2. They had no insurable interest in it.
3. The dredge was not transferred to them.
4. They were not the real parties in interest.
5. Policy was void for want of insurable interest in them.

At this time we wish to call to this Court's attention the circumstance that although counsel for the Appellant makes a statement (page 6, Appellant's Brief), "This appeal confines itself to the two issues about which there was no contradictory testimony, namely, lack of ownership and insurable interest by and in the Appellees and unseaworthiness of the dredge for the towage by reason of the defective hawser," nevertheless, a great portion of the Appellant's Brief concerns itself with a discussion of the alleged false representations and/or violation of warranty by Appellees. These observations appear specifically on pages 11, 18, 19, 20, 22, 23, 39, 40, 41, 51, 53, 54 and 55 of the Appellant's Brief. We do not see how anyone, including counsel for Appellant, in view of his

statement on page 6 of Appellant's Brief, can seriously contend that there were any false representations by the Appellees at any time, or that any warranty of theirs was breached. But since this element has been injected into the argument we find it necessary to answer the same.

The Trial Court found (IX, Tr. 49), "That it has not been established that the plaintiffs or their agents failed to disclose any material facts to the defendant, in violation of the terms of the said insurance policy, or that in obtaining the said extension and amendment of the said policy permitting the said voyage from Nehalem Bay to Tillamook Bay, the plaintiffs or their agents made any false representations or violated any warranty to this defendant."

PLEADINGS AND FINDINGS

Under the heading, "pleadings and findings", (Apt's. Br. 7) the statement is made that "the only kind of insurable interest in the dredge which Appellees have pleaded is ownership". It is true that the complaint alleges (Tr. 2), "That during the times herein mentioned the plaintiffs were the owners of a suction dredge named 'Wishram' ". This allegation was denied in the amended answer (Tr. 18). The Trial Court found "That the plaintiffs are and were at all times herein mentioned proper parties to insure a certain suction dredge 'Wishram' ". The Appellant contends that this constitutes a variance. In this we do not agree, and will discuss this phase of the case at page 28 in this Brief.

STATEMENT OF FACTS

Under this title Appellant undertakes to discuss ownership of the dredge and the insurable interest therein. At the outset, please permit us to remark that we do not regard the language therein a statement of facts, but on the other hand such portion of Appellant's Brief (pp. 8 to 27 inc.) constitutes pure argument and will be accepted as such. It is true that in June, 1946, the dredge "Wishram", built and owned by the Government, was for sale by the War Department Army Engineers, at Coos Bay, Oregon. One Hugh Corgan, an experienced dredge man and an acquaintance of the Steinbachs for about 30 years, arranged with the Army Engineers at Portland, Oregon, for the purchase of the dredge for the benefit of the Steinbachs (Tr. 119-121). There was discussion and negotiation concerning forming a dredging company composed of three individuals, namely, David E. Steinbach, John L. Steinbach and Hugh Corgan (Tr. 105). However, such negotiations were never completed, and we believe the discussion thereof will be of no assistance to this Court. We believe it is sufficient to say that on June 6, 1945, the Army Engineers wrote a letter (Exhibit 22, Tr. 229) to Hugh Corgan. However, far from constituting a "document of title" as contended by the Appellant (Apt's. Br. 10), this letter was in fact merely a receipt for $5,500.00, with authority to the addressee, Corgan, or his representative, to obtain delivery of the dredge at North Bend, Oregon, on Coos Bay. Title could not and did not pass until delivery of the property by the Army Engineers. Hugh Corgan did

obtain delivery of the dredge. He neither took nor retained title to the same at any time (Tr. 119-120). Quite consistently therefore, Capt. Corgan never executed any title instrument to the dredge to the Appellees or anyone else as stated (in Appellant's Br. p. 11, Tr. 99). Hugh Corgan has at all times disclaimed interest in the dredge. The statement (in Apt's. Br. 11) "there is no evidence of any such disclaimer prior to the trial" is incorrect. Such a statement was in fact made by Mr. Corgan when his deposition was taken on May 29, 1946, over a year prior to the date of trial. Furthermore, Addison P. Knapp, a witness for the Defendant-Appellant stated, "Q. Did Capt. Corgan claim to be the owner of it when the insurance policy was issued? A. No. he did not." (Tr. 204).

We come now to the first of a series of imputations of misrepresentation indulged in by counsel for the Appellant, previously referred to in this brief. Statement is made (Apt's. Br. 11) "that John L. Steinbach and David E. Steinbach, doing business as Steinbach Iron Works, furnished the money with which Capt. Corgan bought the dredge, and the money with which he insured it in the names of Appellees *under the pretense that it belonged to them.*" The fact is and the evidence shows that Frances M. Steinbach furnished $1675.00 (Tr. 222) of the money required to purchase the dredge namely, $5,500.00. In addition to this on June 25, 1945, she executed a personal check to Addison P. Knapp Company (agent for the Universal Insurance Company, Appellant) in the amount of $1,250.00 (Tr. 239). This

premium of $1,250.00 covered the risk under the policy for the towage of the dredge from Coos Bay to Nehalem Bay. In the event of no loss, $1062.50 was to be returned to the assureds. There being no claim, premium was $187.50 (Tr. 214). After the receipt of the premium the Appellant returned to the Appellees the sum of $1062.50 by issuing to them its check for $415.74 and applying the balance, namely $646.76 against the cost of the layup premium at Coos Bay and the operating premium at Nehalem Bay (Exhibits 24 A and B). The charge of $187.50, representing the premium cost in the event of no claim, was likewise retained.

In October, 1945, it became desirable to tow the dredge from Nehalem Bay to Tillamook Bay. A similar premium, namely, $1250, was agreed upon by the parties, and on October 24, 1945, an endorsement was added to the policy (Exhibit 26C, Tr. 232). It will be observed that the endorsement provided for the towing to be made by the tug "Umpqua Chief". However, the assureds disclaimed any notice of this requirement or any knowledge of the endorsement which specified the "Umpqua Chief" as the tow until after the towing had taken place and a loss incurred as set out in the complaint (Tr. 2). The towing, in fact, was done by the boat "Julia D" and not the "Umpqua Chief". Any effect of this substitution was expressly waived in this Appeal (Apt's. Br. 6). A charge for the premium for the risk of towing the dredge "Wishram" from Nehalem Bay to Tillamook Bay was rendered to the Appellees in October, 1945. On this occasion only the amount of $187.50 (premium in the event of no claim) was paid

to the Addison P. Knapp Company by a check of the Coast Dredging and Construction, Ltd. bearing the signature of J. H. Corgan, a son of Capt. Hugh Corgan (Tr. 240). This check is dated October 30, 1945, and was endorsed by Addison P. Knapp Co. on November 8, 1945. The dredge became a total loss on November 1, 1945 (Exhibit 39, Tr. 242). Thereafter on November 30, 1945, Addison P. Knapp Company by a letter of that date attempted to return the sum of $187.50 to the Appellees (Tr. 233).

The Brief of the Appellant devotes considerable space to a discussion of the Steinbach family arrangement, and affairs of the Steinbach Iron Works, commencing at page 12. Counsel seems to reason that because the Steinbach Iron Works carried on its ledger the amounts advanced by Frances M. Steinbach for the purchase of the dredge, that this circumstance prevented the Steinbach women (the Appellees herein) from having an insurable interest in the dredge purchased from the Army Engineers. None of the principals involved in this litigation ever contended that Frances M. Steinbach and Carolyn S. Steinbach did not own the dredge until such suggestion was made by counsel for the Appellant (Tr. 199). John M. Steinbach testified that the dredge had been bought for the benefit of the Steinbach wives (Tr. 88). David E. Steinbach testified that the two ladies were the owners (Tr. 112-113). Capt. Hugh Corgan testified that he purchased the dredge as agent for the Steinbachs, and had no further interest in it (Tr. 119-120). The Appellant throughout its brief contends that

Capt. Corgan was the owner of the dredge in spite of all the verbal evidence on that point to the contrary. It interprets a letter from the Army Engineers, dated June 6, 1945, (Plaintiff's Exhibit 22, Tr. 229), as being a title conveying instrument. This letter should be read in connection with the previous one of May 25, 1945, from the same source (Plaintiff's Exhibit 21, Tr. 228). The letter of June 6, 1945, was never intended to transfer title and is not regarded as a title transferring instrument by anyone with the possible exception of counsel for the Appellant. The language is significant; "upon *presentation* of a copy of this letter to the Resident Engineer, United States Engineers Office, Empire, Oregon, he will deliver to you or your authorized representative the property comprising the sale". If the letter transferred title, why was it necessary to present the same for delivery of the merchandise? Furthermore, the Army Engineers understood that someone other than Capt. Corgan might take delivery. In addition, as testified by Capt. Corgan (Tr. 120) the Government does not give a deed to such property so purchased. That it was possible, and in fact, extremely common usage for persons to take title to personal property without a bill of sale or other writing will be demonstrated at a later place in this Brief (see page 39 infra). Since the law and common usage (including that of the United States Government itself) permits transfer of personal property by oral grant, the charges of misrepresentation by counsel for the Appellant come with poor grace. The statement "it was a direct misrepresentation of the fact that

Capt. Corgan was interested, and that he held the legal title to the dredge" (Apt's. Br. 19) is pure sophistry. Capt. Corgan did not hold legal title to the dredge at any time. We agree that Capt. Corgan never testified that he or Mr. Steinbach told Mr. Knapp anything contrary to Mr. Steinbach's statement that the ladies owned the dredge and that the policy was to be issued to them. As a matter of fact, the ladies were still contending that they were the owners of the dredge when they filed their complaint in the District Court on March 30, 1946. It would be a curious type of misrepresentation, indeed, when the same claim was in effect repeated when the complaint was filed:

The manner in which ownership of the dredge was actually acquired by the Appellees was described by John L. Steinbach (Tr. 84):

> "Q. Who contributed the money that went to pay for the Wishram?
>
> A. My brother and I, I believe in the neighborhood of $3800, and then we borrowed $3825. I believe that was the amount—and we borrowed from my wife $1675 and that would make $5500.
>
> Q. Your wife is the plaintiff Frances Steinbach?
>
> A. That is right.
>
> Q. What was done with that money.
>
> A. My wife and I came into Portland together and we purchased a certified check or draft and Mr. Corgan and I went up to the Army Engineers office together, and Mr. Corgan handed them the check and the letter from the Army Engineers accepting the check to Captain Corgan was handed to him and he turned right around and handed it to me.
>
> Q. I am handing you Plaintiff's Exhibit No. 22.

Is that the letter which you say the Army Engineers gave to Captain Corgan?

A. It is.

Q. Had Captain Corgan or anyone else, except the Steinbachs, contributed anything to the purchase price of the Dredge?

A. No.

Q. Prior to the purchase of the dredge, or at the time of the purchase of the dredge, was there any discussion between the Steinbachs as to who was to hold title to the dredge Wishram?

A. There was.

Q. Go ahead and give it.

Mr. Snow: At this point, your Honor, I desire to enter an objection to any and all testimony which might tend to prove parol title to this dredge, on the ground that the Oregon statute provides, and on the further ground that from time immemorial the transfer of boats and vessel have been and are made by bills of sale."

That the Oregon statute did not apply to the transaction between the Army Engineers and the Steinbachs, and that counsel misunderstood its effect, will be demonstrated at a later point in this Brief (see page 13). Still insisting, however, that title to the dredge could be acquired only by a bill of sale, the statement is made (Apt's. Br. 22): "when Mr. Steinbach and Capt. Corgan told Mr. Knapp to issue the policy to the two ladies they withheld from him some very important information" followed with the enumeration of four supposed items in that category. We will point out, first, that the Insurance Company was advised to issue the policy in the names of the two Steinbach women by Mr. Steinbach and not by Capt. Corgan, Tr. 197). The items of

"very important information" claimed to have been withheld from Mr. Knapp (as agent for the Appellant) were:

1. That he was not shown the letter by which the Engineers transferred the dredge to Capt. Corgan. In this connection we contend that Capt. Corgan did not obtain the dredge by such letter, or at all (see Plaintiff's Exhibits 21 and 22, Tr. 228-229). Since no one (except counsel for Appellant) has ever regarded Plaintiff's Exhibit 22 as an instrument conveying title, it consequently could not have been regarded as "very important information". We pause to inquire, in view of the objection interposed to parol evidence of the transfer of the dredge (Tr. 85) page 10 this Brief, that the only method of transfer of a vessel was by bill of sale, whether counsel for Appellant believes any title to anyone was ever transferred by the Army Engineers. Since the letter of June 6, 1945 (Plaintiff's Exhibit 22) is obviously not a bill of sale, by what means did Capt. Corgan acquire title as counsel contends?

2. The fact that the Insurance Company was not advised that the Steinbach Iron Works had furnished money for the purchase of the dredge would not have effected the placing of insurance. This circumstance is best demonstrated by the language on page 22 Appellant's Brief, immediately preceding the charge of withholding, wherein it is stated, "Mr. Knapp said (198): No, I would have told them that the proper way to insure the dredge would be in the name of whoever might hold title to it". In other words, the Insurance Com-

pany did not care who furnished the money for the purchase of the dredge as long as the party that owned it appeared as the assured.

3. The Insurance Company was not told the reason for insuring the dredge in the name of the ladies was to keep the money away from the creditors of the Steinbach Iron Works. By the same argument, we contend that any reason causing the dredge to be in the names of the ladies was unimportant. The conduct of the affairs of the Steinbach Iron Works, and the internal affairs of the two Steinbach families were of no concern to the Universal Insurance Company or Mr. Addison P. Knapp. Parenthetically, we ask what money counsel is referring to at this time. We believe it is safe to say that when the insurance was placed two contingencies existed: there would be a loss, or there would be none. Certainly there was no expectation of a total loss of the dredge so that insurance money would come to the Steinbach women and not the creditors of the Steinbach Iron Works. If such were the expectation, it is safe to say that the contract of insurance would never have been written. What counsel overlooks is that the Steinbach family was putting *title to the dredge,* and any value thereof, in the names of the two Steinbach women, and not the proceeds of any insurance policy.

4. Agent for the Insurance Company was not told that a Corporation to own the dredge was contemplated. Since this was a matter of futurity, an event which never did take place, and could never have affected the placing of insurance in any fashion, we fail to see how

it was "very important information". It certainly was not so regarded by the parties at the time, particularly Capt. Corgan (Tr. 137). Further, in the event of the organization of the corporation and transfer of title of the dredge to it, the policy provided for such contingency. We dare say that it is not unusual for insured property to be sold or conveyed.

Mr. Knapp was never misled by any representations of Capt. Corgan or John L. Steinbach, in spite of the charges now appearing in the Brief of the Appellant. He was satisfied that insurance had been properly placed in the names of the proper parties. This is best demonstrated by a statement on the witness stand that the report of Emmett Rathbun, Surveyor, showed that one J. H. Corgan (son of Capt. Corgan) was the owner of the dredge (Tr. 205-206). He did not pay any attention to this statement (which statement, of course, was incorrect). Appellant states (Apt's. Br. 24), "there was no occasion for Mr. Knapp to be concerned by Mr. Rathbun's statement that J. H. Corgan owned the dredge".

The summary of Appellant's so-called "statement of fact" is no more correct than "the facts" upon which it is based (Apt's. Br. 26).

1. Hugh Corgan never owned the dredge.

> "I purchased her as agent for the Steinbachs." (Tr. 119)

2. The Steinbachs did not loan money on open ac-

count to the Corgans to own and operate the dredge.

> "My wife and I came into Portland together and we purchased a certified check or draft and Mr. Corgan and I went up to the Army Engineers office together, and Mr. Corgan handed them the check and the letter from the Army Engineers accepting the check to Capt. Corgan was handed to him and he turned right around and handed it to me." (Tr. 84)

The final language "statement of facts" (Apt's. Br. 26-27) is interesting. Herein counsel for Appellant contends that the delineation of the business arrangement in the Steinbach family was made to elicit the sympathy of the Trial Court. He objects because the Steinbach men treated their wives fairly. We do not believe that the Trial Court was mislead by any considerations of sympathy. We prefer to believe that the Trial Court was impressed with the fairness of the arrangement. We do not believe that John L. Steinbach spoke an untruth in saying, "well, what's mine is hers (Tr. 99). We do not desire this Court to be mislead by such or similar expressions. On the other hand, we believe the Court is entitled to consider them together with all other circumstances surrounding the purchase of the dredge and the issuance of the policy of insurance.

POINTS, AUTHORITIES AND ARGUMENTS

For convenience of this Court we will discuss in the order in which they appear in the Appellant's Brief, the points and authorities therein set out.

1. The dredge "Wishram" was not a vessel.

Bartlett vs. Steam Dredge No. 14, 107 Mich. 74, 64 N.W. 951, 61 A.S.R. 314.
United States vs. Dunbar, 67 Fed. 783, 14 C.C.A. 639.
Fredericks vs. James Rees & Sons Co., 135 Fed. 730, 68 C.C.A. 368.
Yarnberg vs. Watson, 13 Ore. 11, 4 Pac. 296, 48 Am. Jur., "Shipping," Sec. 36.
O.C.L.A. § 2-907.

Counsel for Appellant contends that the dredge is a vessel, for the very obvious purpose of applying to it the provisions of the Oregon statute of frauds, O.C.L.A. Sec. 2-907. There is no evidence that the dredge was a vessel within the common accepted definition of that term. In fact the only evidence in the case is to the contrary. We refer this Court to the letter of the Army Engineers of May 25, 1945, (Exhibit 21, Tr. 228) where the dredge is denominated a "plant". In the decision of the Ninth Circuit Court of Appeals cited by Appellant (Apt's. Br. 28) the City of Los Angeles vs. United States Dredge Co., 14 Fed. 2nd 365, the Court had under consideration the question of whether a dredge was subject to a Federal law requiring inspection, or amenable to a municipal ordinance requiring the inspection of boilers. The Court held that the dredge came within the term vessel as defined by Sec. 3, Revised Statutes, (9 Fed. Stat. 2nd Ed. 391, Compt. Sec. 3). No Federal statute is involved in this case, nor any definition of vessel under a Federal statute. It is true that the word "vessel" is used at various places in the contract of insurance executed by the

Appellant. However, the laws of the State of Oregon providing for the manner of insuring marine risks, uniformly use the term "ship" instead of "vessel" (see Appendix A, Apt's. Br. 73). While this circumstance may be relatively unimportant, it indicates that there was no particular significance to be attached to the use of the word vessel in the policy. As a matter of fact the word "plant" (which the dredge was) would have been a preferable term to have been employed.

In *Bartlett vs. Steam Dredge*, supra, it was held that a steam dredge was not subject to a labor lien as a water craft where the term water craft was defined by State law to be "used or intended to be used for navigating the waters of this State." The Court said:

> "As described by the defendants, 'the dredge hull is virtually a large scow, with a boiler, engine, and different kinds of machinery, a crane, or boom, and a dipper. It has no means of propulsion, except by towing, nor any rudder. The dredge is used for digging material under water, and is not used for transportation. It is the same thing as a steam shovel on land. It has no master, and is not used for transporting passengers, freight, or anything.'
>
> "The sole purpose of these dredges was to dig, not to navigate. They are not moved from place to place for the purpose of navigation, as are vessels engaged in commerce, nor are they intended to be used for transporting passengers or freight, or the material which they bring up from the lake or river beds."

In *United States vs. Dunbar*, supra, it is stated:

> "The question for decision in this case is as to

whether the dredge boat Tipperary Boy, exported to Canada in 1883, and imported in 1890, is entitled to entry without duty, as a manufacture of the United States, 'returned in the same condition as exported' 22 Stat. 517; Rev. St. U. S. Sec. 2505. This dredge boat was properly regarded as a manufacture or machine and not as a vessel, inasmuch as it had no power, of propelling itself, and is incapable of use save as a dredging machine."

In *Fredericks vs. James Rees & Sons Co.*, supra, it is held that a Pennsylvania law which gave a lien for repairs on "all ships, steamboats or vessels navigating the rivers Allegheny, Monongahela or Ohio in this state" embraced only such vessels as are engaged in the business of commerce or trade on such river, and did not apply to adredge boat without motive power and used only for dredging apparatus. The Court said:

"The ships, steamboats, or vessels referred to, are clearly those intended for the purpose of or actually engaged in the business of navigating the named rivers; that is, in the business of moving on the waters thereof from place to place, whether for the purpose of carrying persons or commodities, or both. This obvious meaning of the words used in the act, excludes a dredge boat, neither intended nor used for the business of moving persons or commodities from place to place on the waters of said rivers. Whatever extension of meaning may be given the words 'ship, steamboat or vessel,' used alone, the word 'navigating' imports a clearly defined limitation which cannot be disregarded, and dredge boats, floating pile drivers, and floating elevators are excluded from the purview of the act, though scows and barges, intended to be towed from place to place for the carriage of passengers or commodities, would be included."

Finally, the term "vessel" has been legally defined in Oregon, *Yarnberg vs. Watson*, supra, as a "structure made to float upon the water for the purpose of commerce or war, whether impelled by wind, steam or oars." This case is the only one apparently ever decided in which the provisions of O.C.L.A. § 2-907 have been analyzed and applied. The question therein involved was whether an uncompleted hull was a vessel so that its sale was required to be in writing. A lower court decision holding that such hull was a vessel was reversed on appeal. Justice Lord said:

> "The only question argued and presented by this record is whether the boat or property transferred at the date of the oral agreement and transfer was a vessel, within the meaning of section 773, Or. Code, which provides that 'a sale or transfer of a vessel is not valid unless it be in writing, and signed by the party making the transfer.' It is conceded that if the work alleged to have been done by the plaintiff was upon his own, and not upon the defendant's property, he would not be entitled to recover. But the defendant contends that the provision of the law above cited only applies to a vessel, and not to some incomplete portion thereof, as a hull or other part, requiring construction of additional parts before it can properly be denominated or become a vessel, and consequently it was error in the court to assume in its charge that the facts as disclosed by the record brought the record within the meaning of this provision of the law by directing the jury that they must find that there was a writing, otherwise there could have been no sale, and thereby fixing the defendant's liability.
>
> "It will not be questioned if, upon the facts, the property was sold and delivered, and, at the time of

such sale and transfer, it was not a vessel, that any writing was required to make such a transaction valid, or make proper proof of that fact. The term 'vessel', in its broadest sense, includes a variety of things obviously not intended to be included in the provision of this law. Webst. Dict. 'Vessel.' Knisely v. Parker, 34 Ill. 484. It has been defined to be any 'structure made to float upon the water for the purpose of commerce or war whether impelled by wind, steam, or oars.' Webst. Dict. 'Vessel.' Chaffe v. Ludeling, 27 La. Ann. 611."

It will be noted that Justice Lord held two things necessary to constitute a vessel. First, it is a floating structure for the purpose of commerce or war; and second, it shall have a means of propulsion. The dredge "Wishram" possessed neither of these characteristics.

(a) The Defense of Statute of Frauds is not Available to the Appellant.

49 Am. Jur. "Statute of Frauds," Sec. 589, Sec. 598.
Ringler vs. Ruby, 117 Ore. 455, 244 Pac. 509, 46 A.L.R. 245.
Roberts vs. American Alliance Insurance Co., 212 N.C. 1, 192 S.E. 873, 113 A.L.R. 310.

In *Ringler vs. Ruby,* supra, the Supreme Court of Oregon, said:

"At the very threshold of the case plaintiff is met with the objection that the alleged contract, by reason of the statute of frauds is void. Defendant, however, is not in position to urge this point. He is not a party to the contract. It does not rest with him to say that the parties thereto will not abide by the same regardless of the statute. There is nothing inherently wrong, nor is it illegal, for an owner of real

property orally to make such an agreement. The statute of frauds was enacted for the protection of the party sought to be charged. It is personal and not available to strangers to the agreement. (Citing authorities)."

In *Roberts vs. American Alliance Insurance Co.,* supra, it was held that the rule that a stranger to an oral contract cannot take advantage of the fact that the contract is not in writing as required by the statute of fraud precludes an insurance company, which has issued to a vendee of a piece of property a policy of insurance upon such property, from asserting the invalidity of the oral contract as a defense to liability under the policy; the Court said:

> "(The plaintiff's) title to the part allotted to him in partition is good as against his brother, unless the statute of frauds be invoked or relied upon as a defense, and a stranger to the transaction, such as the defendant, can take no advantage of the statute (Cowell v. Ins. Co., 126 N.C. 684, 36 S.E. 184; 26 C.J. 173). Hence, in the present action, as against the defendant, it is proper to say that he is the sole and unconditional owner thereof."

2. The policy insured on was not void for lack of insurable interest.

O.C.L.A. Sec. 101-1120.

Bird vs. Central Manufacturers Mutual Ins. Co. 120 Pac. 2d 753, 168 Ore. 1.

Commercial Securities Co. vs. Hall, 140 Ore. 644, 15 Pac. 2d 483.

Under this heading counsel for the Appellant, proceeds under the premise that the Appellees had no legal or equitable relation to the dredge, consequently had no interest to insure. The conclusion would be true if the major premise were correct, which it is not. Counsel cited, but did not discuss, O.C.L.A. Sec. 101-1119 and 101-1120. These two sections are, however, set out on page 73 of Appellant's Brief. We think no discussion is necessary to demonstrate to this Court that the insurance policy executed by the Appellant was not a wager or gaming contract as defined by Sec. 101-1119. However, insurable interest as defined in Sec. 101-1120 has become an issue in these proceedings. To paraphrase the section defining insurable interest: a person has an insurable interest who is interested in a marine adventure, and to be interested in a marine adventure in turn means a person may benefit by the safety or due arrival of the insured property or may be prejudiced by its loss, damage or detention or "may incur liability in respect thereof." This language, particularly the last clause, is quite inclusive and fully capable of covering the interest which the evidence shows the Appellees possessed at the time the policy was issued. It is stated in *Bird vs. Central Manufacturers Mutual Insurance Co.*, supra, "It is well settled that anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. It is sufficient to constitute an insurable interest in property that the insured is so situated with reference to the property that he would be liable to loss should it be injured or destroyed by the peril against which it is insured."

We think the following statement of John L. Steinbach, succinctly summarizes the effect of the family arrangement:

> "Q. (By Mr. Snow:) She is not going to be prejudiced by the loss of the dredge, is she?
> A. Well, I think she will be.
> Q. But she will get her $1650. back.
> A. She will get her $1650. back, but we hold our property in common. If I make a loss she loses, too" (Tr. 98).

Another definition of insurable interest appears in *Commercial Securities Co. vs. Hall*, supra, where the Supreme Court said:

> "In arriving at the meaning of an 'insurable interest,' the following excerpt from 4 Words and Phrases, Third Series, p. 346, will be helpful: 'Any person has an insurable interest in property if he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself.'
>
> "As to what constitutes an insurable interest generally, we direct attention to the following from Cyclopedia of Automobile Law, Huddy (9th Ed.) 13, 14, p. 57: 'Whoever may fairly be said to have a reasonable expectation of deriving a pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an insurable interest.' "

3. In Oregon ownership of personal property may be alleged by simply stating that the plaintiff is owner.

Columbia Hotel Co. vs. Rosenberg, 122 Ore. 675, 260 Pac. 235.

The English case Cousins vs. Nantes, 128 Reprint 203, cited by the Appellant (Apt's. Br. 34) does not state the law in Oregon. The reference to Christman vs. State Insurance Co., 16 Ore. 283, and quoted from in Appellant's Brief has been misinterpreted. In this case (which was an action for loss occurring under a fire insurance policy) one Stansbury, the plaintiff, sued in his own name. His complaint did not allege that he had any interest in the property burned or what that interest was. The Court quite properly held the complaint defective. In the instant proceedings the Appellees alleged their interest, namely, ownership (Tr. 2).

In *Columbia Hotel Co. vs. Rosenberg*, supra, which was an action on a promissory note executed by the defendant in favor of one Higgins, the plaintiff alleged that it was the owner and holder of the note, but there was no allegation of an assignment from Higgins to it. The complaint was held sufficient, the Supreme Court stated:

> "It is argued that Exhibit A shows on its face that the note is payable to Higgins, 'Treasurer, Astoria New Hotel Building Fund,' and that plaintiff is not connected therewith. Defendant inferentially concedes that, if the allegation that plaintiff is now the owner and holder of said agreement and note is an averment of fact, the complaint is sufficient. Defendant contends that such allegation is a mere conclusion of law. Under the simple system of pleading obtaining in this state that allegation states the ultimate fact. It is much more than a mere legal conclusion. Or. L. Sec. 67; Phillips, Code Pleading, Sec. 325; 1 Sutherland, Code Pleading and Practice,

p. 83, Sec. 98. See, in this connection, Bade v. Hibberd, 50 Ore. 501, 93 P. 364."

There was no variance between the pleading and the proof in the instant case.

4. The burden of proof of ownership is fully sustained by the evidence.

O.C.L.A. Sec. 101-1121.

Under this point counsel for Appellant states that the Appellees had the burden of proving the same insurable interest alleged in the complaint, namely, ownership, citing four decisions. In Bell vs. Ansley, 16 East 141 (Apt's. Br. 36), the only case discussed by counsel under this heading, the plaintiff alleged that he was the sole owner of certain goods insured. Since the policy sued on disclaimed joint ownership and the evidence supported joint ownership, the Court properly held that a variance existed. What may have been said by the Supreme Court in Oatman vs. Bankers etc. Assn. 66 Ore. 388, 133 Pac. 1183, 134 Pac. 1033, cannot be authority on the question presented in the present appeal because in the Oatman case the policy involved was a standard fire insurance policy, the terms of which by Oregon law required the interest of the assured to be sole ownership. O.C.L.A. Sec. 101-1801. For failure to comply with this provision the policy was held to be void. The policy sued on in the present proceedings is not a fire policy but was a policy of marine insurance. Consequently, whatever may be

said with reference to the requisite of sole ownership in a fire policy is rendered in complete variance with the provision of Sec. 101-1121, which provides that an assured "need not be interested when the insurance is effected." We do not claim, of course, that the Appellees did not have an insurable interest when the policy was executed by the Appellant. We merely point out the dissimilarity of treatment of insurable interest in the two types of policies. On the question of ownership the witnesses testified as follows:

John L. Steinbach

"I told Mr. Knapp that this dredge had been bought for the benefit of the Steinbach wives, and to make the insurance out to Carolyn and Frances Steinbach" (Tr. 88).

"Q. As far as you know, did the ladies, that is, your wife and the wife of Dave, and yourself, ever transfer that boat at any time after that up to the time of the loss?
A. No."

"Q. Do you claim any interest in that dredge, now, adverse to your wife?
A. No" (Tr. 91).

"Q. Then the agreement by which you claim the ladies came to own the dredge was entirely an agreement made, without writing, between the four members of the Steinbach family?
A. That is right" (Tr. 103).

Frances M. Steinbach

"A. We met at Dave Steinbach's house, John, my husband John, Dave and Carolyn, and we planned on buying this dredge, the Wishram. We talked it over for quite a while and then we decided that

Carolyn and myself should have the Wishram, and it was done for convenience.

The shop had been in the names of John and Dave for years, and we never had had a real good living out of the shop and, so, we thought maybe we could get into something else—if we could get into something else we would have a little bit, maybe we could make a little bit more money than we had in the shop. Not only that, but Dave Steinbach had two boys in the service. * * *

A. We had a boy in the service, too, and we thought we could put this in our names, in the women's names, and then, after it got into working order of some sort, then we would probably turn it over to the boys, or some other affair, but it was not done —it was not to be done until after everything was paid off and was in working order" (Tr. 176-177).

David E. Steinbach

"A. At the time of the purchase of the dredge, my brother, his wife and my wife, we met at our house and talked about what we were going to do when we purchased this dredge here to keep it out of the shop. On account of the financial difficulties there that we had with the Maritime Commission, we did not want to get it mixed up with the shop account, so we had put the insurance in the ladies' names to keep it away from the Iron Works. * * *

Q. Then what did you agree to do about the ownership of the dredge?

A. Well, we agreed to put it in the ladies' names.

Q. Has that agreement ever been changed in any way?

A. No, it never has" (Tr. 112-113).

Hugh Corgan

"A. Then I bought the dredge in—bid the dredge in with the Steinbachs' money and immediately handed over the letter that the Government gave—

the Government does not give a deed to any of that property when you bid. They simply give you so many days to get the property away from the mooring, or wherever it is located.

Q. When you got the letter from the Engineers, the letter which we have marked here as Plaintiffs' Exhibit No. 22, acknowledging receipt of the purchase price of the dredge and telling you to come and get it—in other words, that is the substance of the letter. Where did you get that letter?

A. I got it from the Engineers. * * *

Q. When the insurance policy was finally agreed upon, do you remember who was present?

A. Yes.

Q. Who?

A. John Steinbach and myself.

Q. Was there any discussion at that time? Was there any discussion between John Steinbach and—Who was representing the insurance company?

A. Mr. Knapp.

Q. Mr. Knapp?

A. Yes.

Q. Was there any discussion at that time as to how much insurance should be issued and in whose names?

A. Well, John said the Steinbach women, Mrs. Dave Steinbach and his wife, Frances.

Q. You did not claim to own any interest in it then, did you?

A. No.

Q. And don't now?

A. No." (Tr. 120, 121, 122 and 123).

We do not overlook the ledger pages of the Steinbach Iron Works (Exhibit 7 (4) Tr. 222-223) which show various sums totaling $2925.00 to have been "borrowed from Frankie" nor a promissory note payable to her in that amount, dated June 25, 1945 (Exhibit 7 (11) Tr. 223). These constitute bookkeeping entries for the con-

venience of the parties concerned, and do not militate against the fact, as the evidence shows elsewhere, that the Appellees owned the dredge.

5. Under the allegation of ownership, evidence of any ownership capable of being insured may be received.

Hough vs. City Fire Insurance Co., 29 Conn. 10, 76 A.D. 581.

Tracy vs. Juanto, 103 Ore. 416, 205 Pac. 823.

In Curacao Trading Co. vs. Federal Insurance Co., 50 Federal Supp. 441, discussed at page 37, Appellant's Brief, there was no insurable interest in the plaintiff either as owner or in any other manner. The Court properly denied recovery. In both Vancouver National Bank vs. Law Union & Crown Insurance Co. 153 Fed. 440, 453 and Finlon vs. National Union Fire Insurance Co. 65 Or. 493, discussed at page 38 Appellant's Brief, the policies involved were standard fire insurance policies. As above pointed out (page 24 this Brief) the standard fire insurance policy contains the express provision that it shall be void "if the interest of the insured be other than unconditional and sole ownership." The policy of marine insurance involved in the present proceedings contains no such provision. But even in the case of fire insurance policies the expression "sole ownership" has been interpreted liberally and at variance with the conclusion counsel for Appellant has reached. For example, in the case of *Hough vs. City Fire Insurance Co.,*

supra, the policy sued on contained a provision that if the interest in the property was not absolute it should be so represented to the Company, otherwise the insurance would be void. It appeared at the trial that the insured had an equitable title only. Absolute interest was defined by the Court as one so completely vested in the individual that he could not be deprived of it without his consent. The Court saying:

> "The Court instructed the jury that a perfect legal title was not essential to plaintiff's right of recovery; that he might be regarded as the real owner if he had the equitable title, and if his interest was such that the loss by fire would fall on him; that in such case the property was his, within the fair import of the application in which it was described as his; but that he could not recover, if, in the opinion of the jury, he had been guilty of any fraud, misrepresentation or concealment in regard to the state of this title; that the evidence of the plaintiff's statement regarding his title, made to Houghton, was admissible; * * * that if plaintiff had truly and fairly represented to the company the nature of his interest and title to the property insured, he was not precluded from a recovery by reason of the failure to specify particularly in the policy the nature of that title, nor by reason of the failure to make such representation in writing."

In *Tracy vs. Juanto*, supra, the Supreme Court of Oregon, stated:

> "In addition to other evidence which was offered by the plaintiff to establish the ownership of the sheep, the plaintiff, over the objection of the defendant, was permitted to testify to a declaration, made in the absence of the defendant by the herder of the sheep while the same were in his possession and un-

> der his control and upon lands claimed by the plaintiff, that the defendant was the owner of the sheep. The admissibility of this testimony is the only question necessary for decision, as it is the only one discussed in appellant's brief. That declarations of this nature are admissible and competent as evidence tending to show ownership has been twice decided by this court in similar cases, and therefore this is no longer an open question in this state. Jones Land & Livestock Co. vs. Seawell, 90 Or. 239, 176 Pac. 186, and Keller vs. Johnson, 99 Or. 113, 194 Pac. 185."

Under the rule of this decision and the authorities upon which it is based, the testimony of Capt. Corgan, who is claimed by the Appellant to be the owner and in possession of the dredge, is extremely relevant because he denied any claim or interest in the dredge whatsoever.

6. There was no misrepresentation made to the insurer.

> Commercial Securities Co. vs. Hall, 140 Ore. 644, 115 Pac. 2d 483.
>
> Schmurr vs. State Insurance Co., 30 Ore. 29, 46 Pac. 363.
>
> O.C.L.A. Sec. 101-1132 (3) (Waiver).

Under this point, counsel for the Appellant, totally ignoring the language of page 6 stating "this appeal confines itself to the two issues about which there was no contradictory testimony—namely, lack of ownership and insurable interest by and in the Appellees and unsea-

worthiness of the dredge," undertakes to discuss alleged misrepresentation and concealment by the Appellees at the time of the issuance of the policy. As a matter of law, the rule announced by counsel, that a failure to disclose the true interest voids a policy, is not sustained by any of the authorities cited. For example, in Ohl vs. Eagle Insurance Co. 18 Fed. Cas. No. 10, 473, discussed on page 40 Appellant's Brief, contains the significant language: "If the underwriter is not put upon any inquiries of this nature by any disclosure of a special interest or special ownership, he has a right to suppose that the parties deal with him upon the naked avowal of legal titles." In other words, even admitting, which we do not, that the interest insured had was a special interest and not that of owners, certainly the evidence of the circumstances surrounding the placing of the insurance showed that Mr. Knapp was placed on inquiry and that he declined to inquire (Tr. 205). The argument is made that the policy might have been a wagering policy, void in Oregon, (O.C.L.A. Sec. 101-1119) because one of the definitions of a wagering policy is one made "without benefit of salvage" to the insured. By various reasons appearing on page 42 of Appellant's Brief, counsel attempts to demonstrate that in case of a loss, no salvage would be obtained by the Insurance Company since the Appellees could not transfer a good title. We may best demonstrate the fallacy of this reasoning by stating that the Appellees did have a merchantable title, and could have transferred same to the Insurance Company had it become necessary or desirable. This is not a case where

title to merchandise has been found, in fact, reposing in a party other than the insured. We wish this Court to keep in mind that all the parties involved state that the Appellees had title to the dredge at the time it was insured. The agents of the Insurance Company admitted this fact even after the loss. The only person who states to the contrary is counsel for the Appellant, and we do not believe he is a competent witness. Even if there had been a provision in the policy requiring the Appellees to disclose their true interest, which there was not, this condition could have been waived. We believe the evidence is capable of the application of the rule that an insurance company cannot invite a misrepresentation or tacitly condone a concealment and later claim the policy was thereby voided. In *Commercial Securities Co. vs. Hall,* supra, it was held that a waiver is a voluntary relinquishment of one's known right and may be by acts of the party or by accepting benefits accruing on account of that waiver. The Court stated:

> "The plaintiff herein seeks to void the forfeiture upon the ground, in part, that the defendant company, after full knowledge of all the facts upon which it now relies to establish the forfeiture, retained the premium paid.
>
> "A like situation was presented in the early case of Schmurr v. State Insurance Company, 30 Or. 29, 46 P. 363. In that case the policy of insurance provided that all waivers of its provisions should be in writing. But the court held that, where a company has full knowledge of facts that render void one of its policies, retains the premium, and fails to cancel the policy, it waives the forfeiture, and this can be done by conduct or by parol, although the policy

itself provides that it shall be in writing. Waiver is a voluntary relinquishment of one's known right and may be by acts of the party or by accepting benefits accruing on account of that waiver."

A decision similar in effect is *Schmurr vs. State Insurance Co.*, supra, wherein the Court said:

"When the company, with knowledge of the violation of the provisions of the policy as thus communicated by Irle, retained the premium, and allowed the policy to remain uncancelled, it estopped itself from claiming a forfeiture on account of the barn, although its consent for its erection was not given in writing. The condition of the policy in this regard could be waived or modified by the defendant, and such waiver or modification could be made by parol, although the policy itself provided that it should be in writing. Miner v. Insurance Co., 27 Wis. 693; Webster v. Insurance Co., 36 Wis. 67; Viele v. Insurance Co., 26 Iowa, 9. So that whether Irle's knowledge of the erection of the car barn would be binding upon the defendant or not is immaterial, because the company itself, after being advised of the breach, retained the premium, and took no steps whatever towards the cancellation of the policy, and therefore waived the forfeiture."

The evidence in this case shows that the original insurance coverage was issued to the Appellees on or about June 6, 1945; (Tr. 2) that on June 25, 1945, the Appellee, Frances M. Steinbach, gave her check for $1250. to the agent of the Insurance Company. This check also covered towing from Coos Bay to Nehalem Bay, and the proceeds of the check with the exception of $415.74 were retained by the agent. J. H. Corgan executed a check for $187.50 covering towing charges from Nehalem Bay

to Tillamook Bay on October 30, 1945, and forwarded the check to the agent. It was assumed that no loss would ensue, in the event of which the premium would have been $1250. This assumption was incorrect and the dredge became a total loss on November 1, 1945. However, the check was cashed by the agent on November 8, and the proceeds retained until November 30, when the Addison P. Knapp Co. attempted to return the sum of $187.50.

Numerous Oregon decisions in addition to *Commercial Securities Co. vs. Hall* and *Schmurr vs. State Insurance Co.*, supra, hold that a condition of a policy may be waived. O.C.L.A. Sec. 101-1132 provides that it is the duty of the assured to disclose to the insurer every material circumstance known to the assured, and defines material circumstance as one "which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he would take the risk." Also "whether any particular circumstance, which is not disclosed, be material or not, is, in each case, a question of fact." The section also contains the following significant language (3) "in the absence of inquiry the following circumstances need not be disclosed namely: (a) any circumstance which diminishes the risk; (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (c) any circumstance as to which information is waived by the insurer; (d) any circumstance

which is superfluous to disclose by reason of any express or implied warranty." Both Addison P. Knapp and Emmett Rathbun were entirely familiar with all material circumstances affecting the risk of insuring the dredge. Mr. Knapp, as agent for the insurer, was told by John L. Steinbach that the ladies owned the dredge (Tr. 102). This was true. He did not tell Knapp that Capt. Hugh Corgan owned the dredge because Capt. Corgan did not (Tr. 102). If Mr. Knapp wanted further details he could have inquired, but he expressly waived such inquiry. The Appellant should not now be permitted to complain concerning any situation which was caused by its agent.

7, 8 and 9. The Appellees make no claim of insurable interest as wives, nor as joint tenants or part owners.

Even if their interest is not that of owners of the legal title to the dredge, the evidence supports a claim of equitable title, equally insurable.

Imperial Fire Insurance Co. vs. Dunham, 117 Penna St. 460, 2 A.S.R. 686.

Pacific State Fire Insurance Co. vs. Rowan Motor Co., 122 Ore. 665, 260 Pac. 441.

Hough vs. City Fire Insurance Co., 29 Conn. 10, 76 A.D. 581.

O.C.L.A. Sec. 101-1140.

We shall discuss points 7, 8 and 9 of the Appellant's Brief together, as they are purely abstract considerations

of law and add nothing to the argument of the case. The Appellees have never contended and do not now contend that they obtained insurance on the dredge based on the title of their respective husbands. In Price vs. United Pacific Gas. Co. 153 Ore. 259, 56 Pac. 2nd 116, discussed by the Appellant (Apt's. Br. 43) it was held that an estranged husband could not sue on a burglary and theft policy and recover for the loss of a diamond ring owned by his wife. The evidence showed that the husband and wife were not living in the same residence and, further, the wife did not believe the ring had been stolen. The Court properly denied recovery. Oatman vs. Bankers Fire Relief Assn. 66 Ore. 388, 133 Pac. 1183, cited by Appellant (Apt's. Br. 44), was an action on a fire policy. Deed to the property insured was in the name of the wife only. Consequently, a policy issued to the husband was void under the language of O.C.L.A. Sec. 101-1801 providing the form of all standard fire policies. The three cases cited under point 8 (Apt's. Br. 45) were not discussed by counsel. In Manning vs. U. S. National Bank, 174 Ore. 118, 148 Pac. 255, the Supreme Court of Oregon stated: "we know of no rule of public policy hostile to the enjoyment of the right of survivorship." As to the right of survivorship with which counsel for Appellant unnecessarily concerns himself (Apt's. Br. 45 and 46), we refer this Court to the Manning case cited by the Appellant, if such consideration seems necessary. As indicated, however, we have no serious argument with the language contained in points 7, 8 and 9, except to contend that such argument does not concern itself with any material issue on appeal.

It has been many times decided that title other than a legal title may be insured.

In *Imperial Fire Insurance Co. vs. Dunham*, supra, it was held that a purchaser of land under a written agreement has an insurable interest therein although the purchase money is unpaid, since so far as the insurance is concerned he is to be regarded as the entire, unconditional and sole owner. The Court said:

> "At the time the insurance was effected, Seeley, as we have said, had become the purchaser in fee of the property under articles of agreement with T. Smull's Sons; he had the equitable title only, but he was to all intents and purposes the 'owner' of the property; he was the equitable owner in fee, and in respect to the insurance, we think he may be said to have the entire, unconditional, and sole owner. This provision of the policy does not necessarily distinguish between the legal and the equitable estate. If the title is conditional or contingent, it is for years only, or for life, or in common, it is not the entire, unconditional and sole ownership; but the interest is the same, as it affects the contract of insurance, whether the title of the assured be legal or equitable."

In *Pacific State Fire Insurance Co. vs. Rowan Motor Co.*, supra, it was held that equitable title coupled with actual possession bore all the incidents of legal title and was insurable. The Court said:

> "The plaintiff seeks to show that the policy of insurance was null and void because of the asserted fact that the defendant possessed the motorcars as trustee, and not as sole and unconditional owner. In this state the equitable title, coupled with the ac-

tual possession of the property insured, bears with it all the incidents of legal title. Baker v. Insurance Co., 31 Or. 41, 48 P. 699, 65 Am. St. Rep. 807; Waller v. City of New York Ins. Co., 84 Or. 284, 164 P. 959, Ann. Cas. 1918C, 139."

Again in *Hough vs. City Fire Insurance Co.*, supra, which involved fire insurance on real property, it was held that an equitable interest is an absolute interest and insurable. The insured in this case had entered into an agreement for the purchase of property and had paid a considerable portion of the purchase money. The Court said:

"We think, too, that the evidence conduced to prove that the plaintiff's interest in that property was an absolute interest; that is an absolute interest in property, which is so completely vested in the individual that he can by no contingency be deprived of it without his own consent. And by this contract with Eliakim Hough, and its part performance, the plaintiff had acquired a right to the whole property, of which he could not be deprived without his own consent. So, too, he is the owner of such absolute interest, who must necessarily sustain the loss if the property is destroyed. The subject of insurance was an interest, not a title. It is an interest, not a title, of which the conditions of insurance speak. The terms 'interest' and 'title' are not synonymous. A mortgagor in possession, and a purchaser holding under a deed defectively executed, have, both of them, absolute as well as insurable interests in the property, though neither of them has the legal title."

O.C.L.A. Sec. 101-1140 provides:

"Designation of Subject-Matter. The subject-matter must be designated in a marine policy with

reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured. (L.1921, ch. 354 Sec. 42, p. 665, O.C. 1930, Sec. 46-1140)."

10, 11 and 12. The interest of the Appellees is that of legal owners.

As between the parties themselves, title to personal property may be acquired by oral grant, and a written bill of sale is not necessary.

The Augustine, (D.C. N.Y. 1924), 8 Fed. (2d) 287.

Gaston Williams & Wigmore vs. Warner, 272 Fed. 56 (Affd. 260 U.S. 201, 43 Sup. Ct. p. ..... 676 L. Ed. 210.

The Fitz vs. The Amelie, 6 Wall. 18, 18 L. Ed. 806.

Under points 10, 11 and 12, the Appellant claims that the Appellees were merely general creditors having no insurable interest in the dredge, and that assuming they were secured creditors they could not recover unless it was proven that the Steinbach Iron Works had no other property upon which to realize. With reference to being mere general creditors of the Steinbach Iron Works, we

can only reiterate that the evidence shows no such relationship. In Vancouver National Bank vs. Law Union & Crown Insurance Co. 153 Fed. 440, discussed (Apt's. Br. 47) it appeared that by the explicit admission of the parties the plaintiff had no other interest in the subject of the insurance except as a general creditor. In the present case no one, except counsel for Appellant, has ever advanced the proposition that the Appellees were mere general creditors of the Steinbach Iron Works. Consequently, what was said in the Vancouver National Bank vs. Law Union & Crown Insurance Co., supra, and the American Equitable Assurance Co. vs. Powdering Coal Co. 221 Ala. 280, 128 S. 225, reflects little light on any proposition involved in this proceeding. Concerning the contention (point 12, Apt's. Br. 48), that if a creditor's claim is secured he must first attempt to recover upon other property of the debtor, we doubt that this is the law in Oregon. In fact, O.C.L.A. Sec. 101-1129 provides among other things: "(3) the owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding, that some third person may have agreed, or be liable, to indemnify him in case of loss.' This law plainly provides, so far as insurable interest is concerned, that it makes no difference whether the insured is able to look to someone besides the insurer for indemnity in case of loss. This law was enacted originally in 1921.
ants

In *The Augustine*, supra, the Court had for consideration the ownership of the former "Berengaria" which

had been involved in a collision. The Court stated:

> "But the mere fact of ownership can be proved by the course of dealing, and I think the evidence was sufficient to show that the British government did own the steamship, and that the Cunard Company operated her for the government in the freight and passenger business between November 21, 1919, and February, 1921, and that then the company bought her and has operated her itself ever since, on its own account, in its own line. A ship is a piece of personal property, just like a carriage or a locomotive, and ownership may be proved by such evidence as the foregoing. Mere sale and delivery is enough to confer title. Documentations is for the purpose of fixing the status of a vessel as of the state whose flag she flies; and bills of sale and registration are for the purpose of giving notice to purchasers and mortgagees of the record of title."

Likewise it was held in *Gaston, Williams & Wigmore vs. Warner*, supra, that:

> "As between the parties, the sale and delivery of a vessel passes the title at common law. The question of registration is another and distinct matter. The registration of a vessel is not compulsory, but a privilege and advantage, of which the purchasers may or may not avail themselves if they choose."

In *The Fitz vs. The Amelie*, supra, the Supreme Court of the United States said:

> "The title of Reviere, the claimant, was questioned at the bar, because he did not prove the master executed to him a bill of sale of the vessel. We do not clearly see how this question is presented in the record, for there is no proof, either way, on the subject, but if it is, it is easily answered. A bill of sale was not necessary to transfer the title to the vessel. After it was sold and delivered, the property

was changed and no written instrument was needed to give effect to the title. The rule of common law on this subject has not been altered by statute."

13. The Appellees are the real parties in interest.

Fireman's Fund Insurance Co. v. Oregon R. & N. Co., 45 Or. 53, 76 Pac. 1075.

Blaser vs. Fleck, 96 Or. 187, 189 Pac. 637.

The Appellant, in contending that the action is not prosecuted by the real party in interest, cites Rule 17, Federal Rule of Civil Procedure, as well as Capital Fire Insurance Co. vs. Langhorne (C.C.A. 8), 146 Fed. (2) 237. If we follow his argument, counsel for Appellant seems to contend that the action should have been instituted in the name of Captain Corgan. However, Rule 17 itself provides that "a party with whom or in whose name a contract has been made for the benefit of another * * * may sue in his own name * * * ," so we fail to perceive the effect of the discussion. The Appellees were insured by the policy of insurance issued by the Universal Insurance Company. The Appellees and the Appellant were the only contracting parties. It should be unnecessary to cite authority holding that a party whose name appears to a contract may sue or be sued on it as a party in interest. In fact, it is impossible to ignore this relationship as a matter of law.

In *Blaser vs. Fleck*, supra, it was held that O.C.L.A. § 1-301 (Action must be in name of party in interest) was enacted to protect a party defendant from being harassed again for the same cause. The Court said:

"As we read the complaint in the case at bar, there is no allegation in so many words that the plaintiffs were joint owners of the property involved; yet the pleading was not challenged by a demurrer or otherwise. The defendants did not plead in their answer any facts showing that there was misjoinder of plaintiffs, or that the action was not prosecuted in the name of the real parties in interest. They were not deprived of any right to set up a counterclaim or set-off.

"There can be no question but that both of the plaintiffs would be bound by a judgment in the case, and that the same would be a complete bar to any future action for the property in question. The defendants would be completely protected from being harassed in the future for the same cause of action. Under the present status of the case, it is not a matter of consequence to the defendants as to how the plaintiffs adjust their property rights between themselves. The question as to the technical manner of pleading plaintiffs' ownership of the property was not open to the defendants upon a motion for a new trial."

In any event we hate to think what would have happened if Hugh Corgan had tried to recover on the policy.

14 and 15. There was no misrepresentation or failure to disclose all material circumstances by the Appellees or anyone representing them.

It is not apparent to the writer what distinction, if any, can be made between points 14 and 15 discussed at pages 51 to 55 of Appellant's Brief and point 6 at page 39 of Appellant's Brief, in which the charge of failing to disclose a true interest was made. We again re-

new our criticism of this phase of the Appellant's argument for two reasons. First, only under the most warped type of reasoning can anyone contend there was misrepresentation or failure to disclose material circumstances to the insurer. Second, counsel for Appellant has not confined himself to the two issues which he set for himself at page 6 of Appellant's Brief. O.C.L.A. Sec. 101-1132 is cited in support of point 14 but not discussed. We have previously discussed the provisions of this section at page 34 of this Brief. We ask the Court to examine the three "circumstances" mentioned at page 55 of Appellant's Brief, which counsel for Appellant states should have been disclosed. The first one "that the Appellees did not own the dredge, but were taking the insurance in their names so that in the case of a loss, the creditors of the Steinbach Iron Works could not levy on the money" never could have been a circumstance affecting the risk for at least two reasons. First, the Appellees did own the dredge, and the purpose of placing title in their name was of no concern to the insurer as long as it was actually so placed. Second, the purpose was not only to prevent creditors of the Steinbach Iron Works from acquiring the proceeds of any insurance policy in the event of loss that dictated the arrangement of placing title in the names of the two Steinbach women. Equally as important to the Steinbach family was the purpose of keeping the dredge itself out of the assets of the Steinbach Iron Works. The second circumstance mentioned by counsel for the Appellant is a pure absurdity. The third circumstance carries the same tag.

No one can read the evidence in this case, particularly with reference to the manner in which the hawser mentioned by counsel was obtained, and insist that a disclosure of its intended purpose should have been made. We say without fear of successful contradiction that no one knew what hawser would be used or where it would come from. In any event it was not a concern of the Appellees for the reason that there was no duty on the part of the insured dredge or its owners to furnish any hawser whatsoever. This phase of the case we will discuss under the second specification of error. Concerning the claim that the failure to disclose contemplated ownership of the dredge by a corporation with stock to be divided between the two Steinbach men and Captain Corgan, we may make two observations. First, this was a future arrangement which was never perfected. Second, even though the corporation were formed and took title to the dredge, the insurance policy terms included such a contingency and it would not have been voided.

SECOND SPECIFICATION OF ERROR

Under this specification of error Appellant (Apt's. Br. 55) states that the District Court erred:

1. In failing to hold that the dredge was unseaworthy at the commencement of the voyage because it was equipped with an insufficient towing hawser.

2. In failing to deny recovery because of the alleged breach of an implied warranty that the dredge would

be seaworthy at the commencement of the voyage.

3. In holding that the insufficiency of the hawser was not chargeable to the dredge.

STATEMENT OF FACTS

The Trial Court found (Finding VIII, Tr. 49) "that the said suction dredge 'Wishram' was seaworthy at the commencement of the said voyage." We concede that the Trial Court stated during the course of the trial that the hawser was part of the tug's equipment and not of the dredge.

"Mr. Phillips: My position is that there is no finding as to liability on the part of the dredge for that hawser under the facts and evidence of this case; that the seaworthiness of the dredge was not based on the hawser in any way.

The Court: You mean, it did not include the hawser?

Mr. Phillips: No.

The Court: Because the hawser was part of the tug's equipment and not of the dredge. I agree with you as to the legal proposition and reject your offer, Mr. Snow, to reopen the case on that basis. That seems to me to make the record." (Apt's. Br. 77-78).

The policy itself does not specify whether the tug or the dredge would furnish the hawser to be used in towing. Any suggestion in the Brief of the Appellant that under an implied warranty of the seaworthiness of the

dredge, the dredge owners were required to furnish a hawser suitable for towing is rebutted by the language of the Brief itself (Apt's. Br. 57). Here counsel for Appellant contends that in the original towing from Coos Bay to Nehalem Bay the tug "Umpqua Chief" furnished the hawser and states that when Mr. Rathbun surveyed the dredge on October 17, 1945, he thought the towing would be done by the "Umpqua Chief" by its own hawser. In fact, (at complete variance with the agreement of the parties concerned) an endorsement was added to the policy on October 24, 1945, covering "one trip from Nehalem Bay to Tillamook Bay, in tow of the tug, 'Umpqua Chief.'" The Trial Court determined that the provision for towing by the "Umpqua Chief" was inserted by the agent for the insurer without authority, and was not based on any representation or warranty by the paties insured. Counsel for Appellant concedes this point and states, "we do not raise it again" (Apt's. Br. 53). We mention this circumstance, however, to demonstrate to this Court how improbable it was that any of the contracting parties ever contemplated that the dredge "Wishram" would furnish a satisfactory hawser "thereby complying with the implied warranty of its seaworthiness." The Insurance Company itself undertook to write in the policy by endorsement a provision for towage by the "Umpqua Chief" which they knew would furnish its own hawser. Consequently, the criticism (Apt's. Br. 57) that neither Capt. Corgan nor J. H. Corgan told the Insurance Company that the towage was to be undertaken with a hawser borrowed from the Coast Guard is entirely irrelevant.

The fact, which is supported by the evidence, is that there was not only no representation as to what boat would do the towing but also there was never any intention that the dredge would furnish its own hawser. James H. Corgan testified:

> "Q. Did Mr. Rathbun say that any boat you got would be all right?
>
> A. He said we had to observe the weather and use our own discretion.
>
> Q. He said it did not matter what boat he had?
>
> A. He did not want a skiff. I had an idea that he knew what boat it was.
>
> Q. Did you tell him at that time you intended to borrow a hawser for this towage?
>
> A. No, we did not; didn't even know we would have to.
>
> Q. You did not have in mind that time you might borrow a hawser for the towage, did you?
>
> A. No, sir.
>
> Q. The only equipment that you owned or that you knew you expected to use was the bridle that you had made?
>
> A. That is right. A towboat usually furnishes their own hawser" (Tr. 162).

Hugh Corgan testified:

> "Q. Had you known that the insurance company was insisting that the tow be made from Nehalem Bay to Tillamook Bay by the Umpqua Chief, would you have it towed by the Julia D?
>
> A. Never" (Tr. 129).

He further testified:

> "Q. I will ask you this: At the time of this discussion which you have referred to, in his office after the loss, was that the first time that you ever

heard anything about this tow being made by the Umpqua Chief? A. Yes, sir" (Tr. 132).

The evidence is that he did not see Exhibit 26-B, (Tr. 231) a letter addressed to Capt. J. H. Corgan, dated October 30, 1945, with reference to towing by the tug, "Umpqua Chief" until about November 5th or 6th (Tr. 211).

During the towing of the dredge by the boat the "Julia D" from Nehalem Bay to Tillamook Bay, two hawsers were used. The first hawser broke four or five times (Tr. 190). James H. Corgan testified that this hawser had been obtained from the Coast Guard loft, and that it was placed on the tow boat "Julia D." He said:

"Q. Then you brought Berg down to the boat, did you?
A. No, he drove his own car down.
Q. Then he ran his boat over to the Coast Guard boat house?
A. Yes, sir.
Q. Then you and Boster went in again?
A. Yes, sir.
Q. Did anybody have to let you in with a key this time?
A. The Coast Guard boy, yes, sir.
Q. You again climbed up in the loft and you let this hawser out through the window?
A. Yes.
Q. And Berg coiled it on the boat?
A. Yes, sir" (Tr. 161).

After the dredge and tow had begun the entrance into Tillamook Bay, another hawser was obtained. James

Brakeman, who was a passenger on the tow boat testified:

> "Q. What happened just before the Wishram went on the rocks on the jetty there, about changing the towline?
>
> A. The other one was a little short and they decided to get another one from the Coast Guard. I got off the fishing boat onto the Coast Guard boat and went along with them to get another hawser.
>
> Q. Talk slower and more distinctly. What did you do?
>
> A. Got off the fishing boat onto the Coast Guard boat and went in with them to get another hawser from the Coast Guard, brought it back in and changed the line.
>
> Q. Where did you get that towline?
>
> A. From the Coast Guard" (Tr. 170).

This second hawser did not break until after the dredge foundered on the jetty, and was still holding at the time it went on the rocks.

> "Q. As a matter of fact, you had the hawser that the Coast Guard went in and brought out to you and fastened on with, isn't that right?
>
> A. Yes.
>
> Q. That hawser did not break before you went on the rocks did it?
>
> A. No.
>
> Q. That hawser was still holding when you went on the rocks, isn't that true?
>
> A. That is right" (Tr. 190-191).

The foregoing facts are worthy of consideration for two reasons. First, if by any stretch of the imagination, it should appear that the towing hawser was part of the equipment of the dredge, and not the tow boat, an ade-

quate hawser was actually in use at the time of the foundering. A fortiori at the time of its loss, the dredge was seaworthy even under the reasoning of counsel for the Appellant. The breaking of neither hawser was a proximate cause of the loss. We dismiss as worthless of consideration the final paragraph of page 61 of Appellant's Brief, in which the manner of obtaining the hawser from the Coast Guard is questioned.

POINTS, AUTHORITIES AND ARGUMENTS

1. A policy of marine insurance may embody both a time and a voyage policy.

We make no criticism of this point relied on by Appellant (Apt's. Br. 62).

2. The dredge did not supply its own hawser.

Consequently, there could be no breach of implied warranty of seaworthiness of the dredge because of the condition of the hawser.

By point 2, (Apt's. Br. 62) it is stated that the breach of any warranty contained in a policy of marine insurance will invalidate the insurance regardless of the proximate cause of the loss. This is purely an abstract statement of law and its only application to the facts of the present proceeding appears to be the following assumptions of counsel for Appellant: (1) That the dredge supplied its own hawser; (2) That the hawser was defective; (3) That an implied warranty of seaworthiness

would be breached by furnishing a supposed defective hawser. These assumptions appeared at page 64, Appellant's Brief. Since any argument of counsel for the Appellant under this point is based on an assumption of fact which the evidence shows did not exist, we feel that this Court should not waste time in considering it.

3. There was no breach of any implied warranty of seaworthiness of the dredge.

The Quickstep, 9 Wall. (U.S.) 665, 19 L. Ed. 767.
The Britannia (DC, Va.) 148 Fed. 495.
Osterhoudt vs. Hedger Transportation Co. (S. D. N.Y.) 42 Fed. 2d 561.

We have no serious argument with the manner in which Appellant states its point 3 (Apt's. Br. 64) namely, that the policy was subject to an implied warranty that at the commencement of the voyage the dredge was seaworthy. We believe that at common law there was such a rule, (*see 38 C. J. "Marine Insurance" Sec. 206 to 208 inc.*) and we agree with counsel that the rule at common law is the law in Oregon. Therefore, we agree with what is said in City Motor Trucking Co. vs. Franklin Insurance Co. 116 Ore. 102, 239 Pac. 812, cited by counsel at p. 66, Appellant's Brief, except that the exerpt attributed to Hughes on Admiralty is in fact a statement which appears in 38 C.J. "Marine Insurance," Sec. 206 cited above.

At the expense of being repetitious we point out that both the facts and the law are opposed to the conten-

tions of counsel. The first hawser to be used in towing the dredge was physically placed on board the tug boat "Julia D" by its owner and master, Otto Berg (Tr. 161).

In *The Quickstep*, supra, it was held that the tug master is bound to see that the tow line is sufficient, and this duty is incumbent upon him whether the lines are furnished by the tug or by the tow:

> "It is well settled that canal-boats and barges in tow are considered as being under the control of the tug, and the latter is liable for this collision, unless she can show it was not occasioned by her fault. The Empress, 1 Blatchf., C. C., 365, Steamboat New York v. Rea, 18 How., 223 (59 U. S. XV., 359).
>
> "It was the duty of the tug, as the captains of the canal-boats had no voice in making up the tow, to see that it was properly constructed, and that the lines were sufficient and securely fastened, this was an equal duty, whether she furnished the lines to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together, and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault."

The same rule is applied in *The Britannia*, supra, wherein it was stated:

> "It is no defense for the tug to say that the scow's six inch hawsers were not availed of because of their size and insecurity, and hence that they had to use their own broken hawser. The law imposed upon her the duty of making up the tow and seeing that proper lines were provided, either by the tow or herself. If those on the scow were inept for the service, others should have been provided before en-

> tering upon the voyage, and for loss arising from such defective hawser, whether the same were furnished by the tow or tug, the latter is liable. These are obligations imposed upon and assumed by the tug from the nature of the employment, and for damages for her negligence in this respect she should be held responsible."

In *Osterhoudt vs. Hedger Transportation Co.*, supra, the Court said:

> "The hawser which broke had been supplied by the tug in accordance with the custom on the lake, and there is ample evidence to sustain a finding that at the time the tug delivered it to the barges, it was in a chafed condition which made it unsafe. This evidence is practically undenied and I am satisfied of the tug's negligence in using it. The fact that it had been furnished to the tug by the respondent, Hedger Transportation Company, does not relieve the tug nor make the respondent liable, because there is no evidence when it was furnished to the tug, nor that it was then in a dangerous condition."

Since counsel has not cited any authorities to the effect that failure to furnish a satisfactory hawser was a breach of the implied warranty of seaworthiness, we will continue to argue that there was no breach of this implied warranty.

4 and 5. Any negligence on the part of the tug or its operators does not affect the right of the appellees to recover on the insurance policy.

Under points 4 and 5 (Apt's. Br. 69) counsel injects the question of comparative negligence as between the

operator of the tug and the operator of the tow. We do not criticize the authorities cited under these two points, in fact, we rely on them, but agree with counsel that the question of negligence as between the tug and the dredge is not particularly relevant. Counsel states (Apt's. Br. 70) "we do not know what authorities the Appellees in the Trial Court could possibly rely on to support the idea that * * * the hawser thereby became a part of the equipment of the fish boat and the implied seaworthiness of the dredge was fulfilled." We answer this by saying that the evidence shows that the hawser was a physical part of the tug boat "Julia D" at the commencement of the towing from Nehalem Bay. The authorities we rely upon in this connection have been discussed under point 3 page 52 this Brief. We further suggest that if the Appellant is relying on the breach of any implied warranty, it had the burden of proving by satisfactory evidence that such warranty was breached. This burden has not been sustained. The Trial Court held it was not established that the "plaintiffs or their agents made any misrepresentations or violated any warranties to this defendant" (Tr. 49). Nothing that would justify a reversal of this ruling has been brought to the attention of this Court by the Appellant. We are satisfied that the finding was entirely justified and correct.

ATTORNEYS' FEES

The Appellees are entitled to, and hereby request, a reasonable sum as attorneys' fees incurred on this ap-

peal, to assessed by this Court. The sum of $1500.00 is a reasonable sum to be allowed to the Appellees in this respect.

> Hagey vs. Massachusetts Bonding & Insurance Co., 169 Ore. 132, 127 Pac. 2d 346.

The law of the forum controls the allowance of attorneys' fees.

> Horwitz vs. New York Life Insurance Co. (C.C.A. 9, 1935) 80 Fed. 2d 295.

O.C.L.A. Sec. 101-134, provides in part:

> "If attorney fees are allowed, as herein provided, and on appeal to the Supreme Court by the defendant the judgment is affirmed, the Supreme Court shall allow to the respondent such additional sum as the Court shall adjudge reasonable as attorney fees of the respondent on such appeal."

CONCLUSION

In concluding we wish to call to this Court's attention the significant language contained in the letter of October 30, 1945, (plaintiff's exhibit 26-B, Tr. 231) written to Capt. J. H. Corgan at Garibaldi, Oregon, and signed by Addison P. Knapp, first, parenthetically observing that the letter was addressed to the wrong person at an improper address. In this letter the premium of $187.50 was rejected. The reason given for its rejection: "the company's reason for being unwilling to accept the remittance is based on the fact that the Suction Dredge 'Wishram' was not towed from Nehalem Bay to Tilla-

mook Bay by the tug 'Umpqua Chief' as called for by the endorsement." This was the only reason assigned by the agent for the Insurance Company for denying liability under the policy. It was abandoned on appeal (Apt's. Br. 53). It was not until the Appellant prepared its answer that it contended that the policy was void because the Appellees did not own the dredge (Tr. 33-34) or that the implied warranty of seaworthiness was violated because of the use of a defective hawser. This change in attitude is not impressive particularly in view of the fact that the insurance company accepted and retained many hundreds of dollars of the Appellees money for premiums.

We respectfully urge that the judgment and findings of the Lower Court be sustained.

Respectfully submitted,

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APPENDIX A

O.C.L.A. Sec. 101-1129: (Insurable Interest—Quantum of Interest)

> "(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss. (L. 1921, ch. 354, Sec. 31, p. 665; O. C. 1930, Sec. 46-1129)."

O.C.L.A. Sec. 101-1132: (Disclosure and representations)

> "(3) In the absence of inquiry the following circumstances need not be disclosed, namely: (a) any circumstance which diminishes the risk; (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (c) any circumstance as to which information is waived by the insurer; (d) any circumstance which is superfluous to disclose by reason of any express or implied warranty."